IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

JUDGMENT
IN
1. S.B. Criminal Jail Appeal No.231/2001

Kailash S/o Rambabu
Versus
The State of Rajasthan through PP

IN
2. S.B. Criminal Appeal No.561/2007

Sanjeev Kumar S/o Chandeshwarai
Versus
The State of Rajasthan through PP

Date of Judgment :::: 8th May, 2007

PRESENT
Hon'ble Mr. Justice Narendra Kumar Jain

Presence in Criminal Appeal No.231/01

Ms. Rajesh Kandwal, Amicus Curiae, for accused-appellant Kailash
Smt. Nirmala Sharma, P.P., for the respondent State

Presence in Criminal Appeal No.561/2007

Shri S.S. Sunda with
Shri Vipul Jaiman and
Shri Sher Singh Mehla, Counsel for accused-appellant Sanjeev Kumar
Smt. Nirmala Sharma, P.P., for the respondent State

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By the Court:-

These two appeals, on behalf of accused Kailash and Sanjeev Kumar, relate to common FIR No.50/94 registered at Police Station Shahajahapur, District Alwar, therefore, they are being disposed of by this common order.

The Special Judge, Scheduled Castes & Scheduled

Tribes (Prevention of Atrocities) Cases & Additional Sessions Judge, Alwar, in Sessions Case No.76/1994, has convicted both the accused-appellants Kailash and Sanjeev by two separate judgments dated 31.1.2001 and 7.2.2007, respectively, as under:-

Under Sections	*Sentence of Imprisonment*
376, IPC	To undergo 7 years rigorous imprisonment and a fine of Rs.1,000/-; in default of payment of fine, to further undergo 6 months additional rigorous imprisonment.
366, IPC	To undergo 5 years rigorous imprisonment and a fine of Rs.5,00/-; in default of payment of fine, to further undergo three months additional rigorous imprisonment.
3(1)(xi) of the SC & ST (Prevention of Atrocities Act	To undergo 2 years rigorous imprisonment and a fine of Rs.3,00/-; in default of payment of fine, to further undergo one month additional rigorous imprisonment.

All the sentences were ordered to run concurrently.

Brief facts giving rise to these appeals are that a written-report was lodged by Tarachand on 17th April, 1994 at Police Station Shahajahapur about abduction of his daughter Saroj, aged about 16 years, by accused-persons Kailash and Sanjeev, and, on that basis, FIR No.50/94 was registered under Sections 363 and 366, IPC, and under Section 3 of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989. Kumari Saroj was recovered from the custody

of both appellants and thereafter her statement was recorded and offence under Section 376, IPC, was also added.

After completion of investigation, the police filed a challan against both the accused – Kailash and Sanjeev under Sections 363, 366, 376, IPC, and under Section 3 of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989.

Accused Sanjeev jumped his bail-bonds and he was declared absconder by the trial court vide order dated 2.8.1999. The trial proceeded against accused Kailash only. The trial court framed charge against him under Sections 366 and 376, IPC, and under Section 3(1)(xi) of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989, which were denied and trial was claimed.

The trial court, after considering the prosecution evidence on the record, convicted and sentenced the accused Kailash vide impugned judgment dated 31.1.2001, as mentioned above.

Being aggrieved with the same, the accused Kailash preferred an appeal through the Superintendent, District Jail, Alwar, which was registered as S.B. Criminal Jail Appeal No.231/2001.

Accused Sanjeev surrendered himself before the trial court on 5.10.2005 and thereafter trial

commenced against him. The trial court framed the charge against him for the offence under Sections 366 and 376, IPC, and under Section 3(1)(xi) of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989, and after considering the entire evidence on the record convicted and sentenced the accused-appellant vide impugned judgment dated 7.2.2007, as mentioned above. Being aggrieved with the same, he has preferred S.B. Criminal Appeal No.561/2007.

The learned counsel for the accused-appellants contended that the learned trial court, vide its impugned judgment dated 31.1.2001 recorded a finding that prosecutrix was about 18 years of age and even by another Presiding Officer, on the basis of separate evidence in the case of accused Sanjeev Kumar, vide impugned judgment dated 7.2.2007, recorded a finding that the prosecution has failed to prove that Saroj was less than 18 years of age, therefore, from both the judgments it is clear that the prosecutrix Saroj was about 18 years of age and she was not less than 18 years and in view of her statement coupled with other prosecution witnesses it appears that it is a case of consent and she was not abducted by the accused but she herself went with the accused-persons and it being a case of consent and consented sexual intercourse, the trial court committed an illegality in convicting

the accused-appellants. He referred the statements of prosecutrix Saroj, Tarachand (father of Saroj), Constable Dilbagh Singh, (who recovered Saroj and brought her at Shahajahapur), and contended that the learned trial court committed an illegality in not appreciating the statement of PW-2 Saroj correctly and wrongly recorded a finding that she was abducted and accused-persons committed forcible sexual intercourse with her. He contended that she remained with accused-persons from 17.4.1994 to 4.5.1994 and she did not raise any alarm and lived with both the appellants willingly and she being not less than 18 years of age, it should be presumed that it was a case of consent and accused-persons have committed no offence and they are liable to be acquitted.

The learned counsel for the State defended the judgments of the trial court and contended that there is ample evidence on the record including the statement of prosecutrix Saroj and her father Tarachand to prove the charge against accused persons and finding of the trial court is based on sufficient evidence and this is not a fit case for interference by this Court, and both the appeals are liable to be dismissed.

The learned counsel for the accused-appellants, in support of their contentions, also referred the

following cases:-

1. Balu Singh & Others Vs. State of Rajasthan - 2002 (1) Cr.L.R. (Raj.) 1663

2. Jinish Lal Sah Vs. State of Bihar - 2003 Cr.L.R. (SC) 207

3. Shankerlal Vs. State - 2005 (2) Cr.L.R. (Raj.) 1677

I have considered the submissions of learned counsel for the parties and minutely scanned the impugned judgments as well as the record of the trial court and also the citations referred by the learned counsel for accused-appellants.

So far as documentary evidence in both the cases is concerned, the same is one, but their Exhibit Numbers are different. The prosecutrix and other prosecution witnesses have been examined again when accused-appellant Sanjeev surrendered before the trial court and trial commenced against him.

In the case of accused Kailash, the prosecution filed the following 13 documents:-

Exhibit P-1	Written-report
Exhibit P-2	FIR
Exhibit P-3	Recovery-memo of Saroj
Exhibit P-4	Receipt
Exhibit P-5	Receipt dated 29.6.94 of Rajasthan Forensic Laboratory
Exhibit P-6	Medical-report of accused Sanjeev
Exhibit P-7	Medical-report of Kumari Saroj

Exhibit P-1	Written-report
Exhibit P-8	Treatment ticket of Saroj
Exhibit P-9	Another ticket of treatment of Saroj
Exhibit P-10	Medical-report of accused Kailash
Exhibit P-11	Arrest-memo of accused Kailash
Exhibit P-12	Arrest-memo of accused Sanjeev
Exhibit P-13	FSL report

Following prosecution witnesses were examined in the case of accused Kailash:-

PW-1 Tara Singh, PW-2 Shila, PW-3 Kumari Manoj, PW-4 Saroj, PW-5 Savitri, PW-6 Hari Singh, PW-7 Kamal Singh, PW-8 Dilbagh Singh, PW-9 Dr. Jaishankar Sharma, and PW-10 Premchand.

During trial against accused Sanjeev the documents were exhibited and numbered as under:-

Exhibit P-1	Recovery-memo of Saroj
Exhibit P-2	Written-report
Exhibit P-3	FIR
Exhibit P-4	Seizure-memo of Packets
Exhibit P-5	Receipt
Exhibit P-6	Medical-report of accused
Exhibit P-7	Medical-report of Saroj
Exhibit P-8	Arrest-memo of accused Sanjeev
Exhibit P-9	X-ray report of Saroj

Prosecution examined following prosecution witnesses in the case of accused Sanjeev:-

PW-1 Savitri, PW-2 Saroj, PW-3 Shila, PW-4

Tarachand, PW-5 Dilbagh, PW-6 Hari Singh, PW-7 Dr. J.L. Sharma, PW-8 Premchand, PW-9 Manoj, PW-10 Kamal Singh, PW-11 Dr. B.L. Gupta, PW-12 Dr. Indu Gupta and PW-13 Kapurchand.

In the written-report, Tarachand alleged that he, his family members and Saroj were sleeping in their house and when he saw Saroj at about 5'O clock in the morning then he came to know that she is missing from her bed. She was suffering from diarrhoea, therefore, he thought that she might have gone for natural call but when she did not come for some time then they searched her. Two persons Kailash and Sanjeev were living nearby in front of their house and both were also missing from their room. He suspected on them.

The police registered FIR and started investigation in the matter. During investigation, a team was constituted to search Saroj. Constables Dilbagh Singh and Jaswant Singh, both, went Bihar at the address of accused-persons, but they did not find Saroj there, however, they received some secret information and went Calcutta at the address given by the informer and they found Sanjeev and Kailash both sitting there and Saroj also came there. They took all the three persons with them and brought at Police Station Shahajahapur on 5.5.1994.

The prosecutrix Saroj, in her statement, stated that she was sleeping in her house and she heard that their buffaloes were crying and she went to saw them. She also went to toilet and came back, thereafter, she saw that both the accused-persons were standing there. Both caught hold her and shut her mouth, they were having knife in their hands. She was pushed and they both took her with them. They came near petrol-pump and stopped a truck and went therein. Thereafter she was taken in train by both of them and came at Calcutta where she was kept in one room and there both the accused-persons committed forcible sexual intercourse with her number of times during the said period. She raised hue and cry but always she was given threatening and knife was shown to her number of times during her travelling as well at the room. In both the statements of prosecutrix Saroj, recorded during trial against accused Kailash as well as Sanjeev, she stated about forcible sexual intercourse committed by both the accused-persons with her at the knock of knife and threatening.

So far as medical-report of Kumari Saroj is concerned it was opined therein that there is no injury on her person and definite opinion about rape was not given as the same was kept reserved to be given after receipt of FSL Report. As per FSL Report (Exhibit P-13) human semen was detected in Exhibit

No.1 (From packet marked A), 2 (from B) and 3, 6 (from A-1). From this report, it is clear that human semen was found on underwear and petticoat of the prosecutrix. Prosecution witnesses Tarachand (father), Shila (sister), Kumari Manoj (another sister), Savitri (mother), have corroborated the statement of prosecutrix Saroj. Prosecution witnesses Dilbagh Singh has stated that he went to Bihar and Calcutta in search of Saroj and when he reached at the address given by the informer he found Sanjeev, Kailash and Saroj sitting in a 'jhopdi' (hut) and they all were taken in custody and they brought all the three at the Police Station Shahajahapur. Kumari Saroj was recovered from the custody of both the accused-persons. As per the medical-report, both the accused-persons were found capable of sexual intercourse. The prosecution witness Premchand, the Investigating Officer, has also proved the prosecution case and the charge against the accused persons.

It is relevant to mention that both the accused-persons, in their statements before the trial court recorded under Section 313, Cr.P.C., have not stated that Saroj went with them voluntarily. Both have stated that a false case has been registered against them.

It is correct that the finding of the trial court in respect of age of the prosecutrix is that she

is about 18 years of age and the prosecution has failed to prove that she is less than 18 years of age but the said age is relevant only if a conclusion of the prosecution evidence comes that the prosecutrix herself went with the accused-persons or she was willing to go with them and she was a consenting party to the alleged abduction or sexual intercourse. From the statement of the prosecutrix, which is corroborated by other prosecution evidence, as referred and discussed above, it is clear that accused-persons were two in number and it is not a case that there was only one person who wanted to marry with her and she went to marry with him but from the prosecution evidence including the statement of the prosecutrix Saroj it is clear that she was caught hold by both the accused and at the knock of knife she was taken by both the accused-persons and both of them gave threatening and knife was shown to her from time to time and she was taken to Calcutta and both the accused-persons committed forcible sexual intercourse with her number of times. The cross-examination of prosecutrix does not reveal that she was a consenting party to alleged abduction and sexual intercourse. It is a settled law that on the basis of sole testimony of prosecutrix, the accused-persons can be convicted if her testimony inspires confidence of the Court and it is not necessary that her testimony should be

corroborated with the medical evidence.

I have considered the above citations referred by learned counsel for the appellants and I find that all the cases were decided on the basis of their own facts and circumstances and evidence available in respective cases, therefore, the said judgments are not and cannot be made applicable in the facts and circumstances of the present case.

I have also considered the impugned judgments passed by the trial court and found that the trial court has considered the prosecution evidence in detail and rightly recorded a finding that the prosecution has proved the charge against both the accused persons. The trial court has rightly convicted the accused-persons.

In view of the above discussion and reasons, I do not find any illegality in both the impugned judgments passed by the trial court. There is no merit in the contentions of the learned counsel for the appellant and both the impugned orders of conviction passed by the trial court do not call for any interference by this Court in the facts and circumstances of the present case.

So far as submission of learned counsel for appellants regarding reduction of sentence of imprisonment awarded by the trial court is concerned, I find that the offence under sub-section (1) of

Section 376 IPC, is punishable with minimum sentence of 7 years imprisonment but there is proviso thereto and as per the said proviso the court may, for adequate and special reasons, impose a sentence of imprisonment for a term of less than seven years.

In Prem Chand Vs. State of Haryana, AIR 1989 SC 937, in the peculiar facts and circumstances of that case, the Hon'ble Supreme Court reduced the sentence of imprisonment of ten years awarded under Section 376 (2) IPC, to a period of sentence of imprisonment of five years. The State of Haryana filed review petition before Hon'ble the Supreme Court in the above case and the same was dismissed. The decision of the Hon'ble Supreme Court in that review petition is reported in (1990) 1 SCC 249 (State of Haryana v. Prem Chand & Others).

In Ram Kumar Vs. State of Haryana – (2006) 4 SCC 347, their Lordships of the Hon'ble Apex Court reduced the sentence of seven years under Section 376, IPC, to a period of three years imprisonment. Para No.3 of the judgment reads as under:-

> "3. The appellant, aggrieved by the order passed by the High Court has filed the above appeal by way of appeal. We have been taken through the statement and evidence recorded by the Court. Our attention was also drawn to the judgment passed by both

> the Sessions Court as well as the judgment passed by the High Court. The learned counsel for the appellant drew our attention to the statement of the girl Bimla (PW-5) and also drew our attention to the evidence of the doctor. We have carefully analysed the evidence tendered by the prosecution. In our opinion, sufficient evidence was tendered by the prosecution to prove the guilt of the accused. However, at the time of hearing it is brought to our notice that the girl has now got married and living with her husband. The said statement is also ratified by the evidence of the father of the girl. Having regard to the peculiar facts and circumstances of the case, we are of the view that the sentence imposed by the Sessions Court and as affirmed by the High Court under Sections 366 and 376 of the Penal Code is on the highside. In our opinion, ends of justice would be amply met if we reduce the sentence to three years. We do so accordingly."

In the case of State of Chhattisgarh Vs. Lekhram (2006) 5 SCC 736 the Hon'ble Apex Court reduced the minimum sentence under Section 376, IPC, of seven years to a sentence of one-and-half-year imprisonment, already undergone by accused therein. Para 16 of the judgment reads as under:-

> "16. The prosecutrix was a mature girl. She was married.

> She spent a few months in her in-laws' place. The respondent was working in her house. They, thus, knew each other for a long time. The prosecution evidently could not prove its case that she was enticed away from the custody of her guardian by the respondent on a false plea that he would marry her. She denied the said suggestion as presumably she was aware that she being married, the question of her marrying the respondent again may not arise. She lived for some time with the respondent in a rented house. Both the courts proceeded on the basis that she was a consenting party. The occurrence took place in the year 1986. The respondent preferred an appeal before the High Court in the year 1987. The same remained pending for about 10 years. The special leave petition was filed by the State 230 days after the prescribed period of limitation for preferring such appeal. The delay in filing the special leave petition, however, was condoned. He is said to have remained in custody for about one-and-a-half years. In the peculiar facts and circumstances of this case and having regard to the facts that both the courts have arrived at the conclusion that she was a consenting party, in our opinion, it may not be proper to send the appellant back to prison."

After considering all the facts and circumstances of the present case as well as the above referred judgments of the Hon'ble Apex Court, I find

this case to be a fit one to reduce the sentence of imprisonment awarded by the trial court and in my view the ends of justice will meet in case the sentence of imprisonment of both appellants under Section 376, IPC, is reduced to a period of 5 years rigorous imprisonment.

Consequently, both the appeals of both the accused-appellants are partly allowed. The impugned judgments passed by the trial court are modified. Their conviction and sentence under Sections 366, IPC, and 3 (1)(xi) of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989, is maintained, but, while maintaining their conviction under Section 376, IPC, their sentence under this Section is reduced to a period of 5 years rigorous imprisonment and a fine of Rs.1,000/- (Rupees one thousand); in default of payment of fine, to further undergo 15 days additional rigorous imprisonment.

A copy of this judgment may also be placed in the file of S.B. Criminal Appeal No.561/2007.

(Narendra Kumar Jain) J.

//Jaiman//